Evaluating Compliance Costs for Proposed Washington Human Health Water Quality Criteria

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As part of the rulemaking associated with the anticipated human health water quality criteria, the Department of Ecology is required to prepare a cost-benefit analysis under the significant legislative rule (SLR) provision in the state Administrative Procedures Act (APA). The analysis of costs should assume, in the event Washington adopts criteria on the same basis as the state of Oregon, there will be substantial costs associated with new section 303(d) listings of impaired water bodies as well as eventual compliance costs for facilities covered under individual and general water quality permits. Significant compliance costs should be deferred until approved EPA test methods are able to more precisely track pollutant concentrations but Ecology should assume that new test methods will be approved over a ten to twenty year period and that third party actions may compel Ecology to derive numeric permit limits that require compliance. These circumstances are not speculative based on current precedents and should be included in a cost benefit analysis. Without that analysis it is doubtful that the department will be able to show substantial compliance with the SLR requirements.

1. Significant Legislative Rules – RCW 34.05.328

The SLR statute was initially adopted as part of a regulatory reform effort in 1995. The statute generally applies to regulations adopted by the Department of Ecology; the department has already acknowledged that the HHWQC will constitute a significant legislative rule subject to RCW 34.05.328.

The key elements of the SLR statute include:

- Statement of general goals and objectives. A detailed statement of the general goals and objectives of the statute that the rule implements. RCW 34.05.328(1)(a).

- Statement of necessity and alternatives analysis. A determination that the rule is necessary to achieve the general goals and specific objectives, an analysis of alternatives to rulemaking, and analysis of the consequences of not adopting the rule. RCW 34.05.328(1)(b).

- Preliminary and final cost-benefit analysis. A preliminary cost-benefit analysis must be prepared at the time a draft rule is published for public comment. A final cost-benefit analysis must be issued when the rule is adopted. RCW

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34.05.328(1)(c). The cost-benefit analysis must include a determination that the "probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented." RCW 34.05.328(1)(d).

- Least burdensome alternative analysis. A determination, after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives identified under RCW 34.05.328(1)(a). RCW 34.05.328(1)(e).

- Justification for more stringent requirements than federal law. Ecology must determine if the rule is more stringent than federal standards. If so, Ecology must determine that the difference is justified either by a state statute that explicitly allows the agency to differ from federal standards or by "substantial evidence" that the difference is necessary to achieve the general goals and specific objectives stated under RCW 34.05.328(1)(a). RCW 34.05.328(1)(h).

- Implementation plan. Prior to adoption, Ecology must provide an implementation plan that describes how the agency intends to implement and enforce the rule including a description of the resources the agency intends to use, how the agency will inform and educate affected persons about the rule, how the agency will promote and assist voluntary compliance, and an evaluation of whether the rule achieves the purpose for which it was adopted. RCW 34.05.328(3).

- Report to joint administrative rules review committee. After adopting a rule regulating the same subject matter as another provision of federal law, Ecology will be required to submit a report to the legislature identifying the existence of any overlap, duplication, or difference with federal law and making recommendations for any legislation necessary to eliminate or mitigate any adverse effects of such overlap, duplication or difference. RCW 34.05.328(4).

Compliance with the APA's procedural requirements including the SLR provisions is reviewed for "substantial compliance." RCW 34.05.375. Substantial compliance with the SLR should be guided by the findings adopted as part of the regulatory reform legislation in 1995. Those findings are appended to RCW 34.05.328 and include a clear directive that courts reviewing administrative rules should "determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through a process of reason; and whether the agency took a hard look at the rule before its adoption." Laws 1995 c 403 §1. The 1995 legislative findings include several key principles applicable to Ecology's rulemaking:

- Rules should assure that policies are clearly understood, fairly applied and uniformly enforced.

- Rules should not impose excessive, unreasonable, or unnecessary obligations.
- Rules should not be used to establish substantial policy decisions; those decisions should be made by the legislature.
- Rules should be justified and reasonable based on common sense criteria.

Ecology staff have suggested at various public meetings and workshops around the development of HHWQC that it would be speculative to assess the costs of the proposed criteria where approved EPA water quality test methods are sensitive enough to detect concentrations at levels close to the anticipated criteria. While there is substantial merit to the position that the department should not use unapproved EPA test methods to derive permit limits or compliance, there is enough precedent in 303(d) listings and current litigation to absolutely require an assessment of compliance costs in the SLR analysis.

2. Section 303(d) Listings

Clean Water Act (CWA) Section 303(d), 33 U.S.C. § 1313(d), requires states to identify water bodies that are not achieving state water quality standards and to submit to EPA a proposed 303(d) list of impaired water bodies. States are required to update this list every two years.

The recent interactions between EPA Region 10 and the state of Oregon Department of Environmental Quality (DEQ) are instructive on the potential impact in Washington if Ecology adopts HHWQC on the same basis as Oregon. Oregon submitted its last revised 303(d) list to EPA in 2010 which was prior to EPA approval of the current Oregon HHQWC in 2011. EPA reserved its approval of the 303(d) list in March 2012 proposed the addition of additional numerous listings based on the adopted HHQWC. *See http://yosemite.epa.gov/R10/water.nsf/TMDLs/R10addsto2010ORList*

The cost benefit analysis should assume that Ecology will have to update its 303(d) list to reflect the new Washington HHWQC within several years of their final adoption and approval. An illustration of what that might mean can be seen with PCB listings if Washington was to follow the Oregon approach. PCB data from the Ecology Phase 3 Report, Characterization of Toxic Chemicals in Puget Sound and Major Tributaries, 2009-2010 indicates that most of the Puget Sound from the Strait of Juan de Fuca to South Sound has PCB concentrations in the water column above the Oregon HHQWC PCB criterion of 6.4 pg/L. *See* attached Table.

If this is the case, Ecology should assume in its cost analysis that there will be substantial 303(d) listings based on the HHWQC if the criteria are derived on the same bases as the Oregon HHWQC. Ecology should evaluate the cost in terms of fiscal and economic impact that will be associated with the regulatory efforts and the limitations that will be imposed on the state that result from such listings.

3. Permit Compliance

Two pending NPDES permits illustrate the potential for significant compliance costs for facilities that operate under water quality permits in the state of Washington. Both of these cases implicate numeric effluent limits for PCBs and the test methods that will be used for compliance monitoring. Ecology should properly use only approved EPA test methods for compliance (40 CFR 122.41(j)(4)) but these cases illustrate that it is more than speculative that the department will have to use unapproved test methods to establish permit limits and assess compliance. As such the cost benefit analysis should include an assessment of compliance costs to achieve the new HHWQC.

In *Sierra Club v. Ecology and Spokane County*, Final Findings of Fact, Conclusions of Law and Order, PCHB No. 11-184 (2013), an environmental group and Indian tribe challenged a NPDES permit issued to a new wastewater treatment plant on the Spokane River. At the time of permit issuance, the appellants alleged the river was on the state 303(d) list as impaired for PCBs. However, the PCHB ruled that "...the facility discharges into a segment of the Spokane River that is not on Washington's 303(d) list for PCBs." The appellants asserted that the permit was unlawfully issued for a new discharge to a listed water body without the state having first adopted a water quality improvement plan or Total Maximum Daily Load for the river. The appellants also asserted that Ecology should have established numeric effluent limitations for PCBs as there was sufficient evidence to make a reasonable potential determination that the discharges from the new plant are likely to cause or contribute to the applicable PCB water quality criteria. The applicable criteria are part of the Spokane Tribe of Indians' water quality standards that include a PCB criterion that is more stringent than the criterion in the Oregon HHWQC.

The PCHB granted the appeal and held portions of the permit invalid. The Board concluded that the new discharge was not to a listed water body segment even if downstream segments are listed. The Board also excused Ecology's failure to perform a reasonable potential analysis on the basis that there was insufficient information to conduct an analysis. The Board nonetheless found that there was enough data (particularly from wastewater treatment plants on Puget Sound) to conclude on a narrative basis that the new plant will cause or contribute to a violation of water quality standards. On this basis, the Board remanded the permit to Ecology to establish numeric PCB limits "at the earliest possible time." The same groups have made this case to EPA Region 10 on pending NPDES permits for three municipalities in Idaho that discharge to the Spokane River.

The Spokane County permit decision is now on judicial review before the state Court of Appeals and the Idaho permits have not been issued. We do not know, obviously, how the issues in the appeal and the permits will be resolved but they provide a sufficient basis for Ecology to include a cogent analysis of costs assuming that the permits and similar permits issued after Washington adopts its own HHWQC will include numeric limits and compliance requirements to achieve the new criteria.

The second case to note is *Puget Soundkeeper Alliance v. Ecology*, PCHB 13-137, set for hearing on September 22, 2014. This case is an appeal of an NPDES permit for a metal scrap facility on the Duwamish River. Ecology set numeric limits for PCBs and compliance levels using the detection limits of an unapproved EPA test method. The method is one that has been widely used in other environmental initiatives on the river. The appellant nonetheless objects to the failure to impose more stringent limits and the use of EPA test method 1668 for compliance. Ecology may well prevail in defending the permit and its discretion not to use an unapproved test method but the case itself raises enough concern that Ecology must consider the cost of state HHWQC if it is required by the PCHB in this case or the Spokane County permit case to use the more sensitive but unapproved test method.

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